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No. 04-944

# In The Supreme Court of the United States

JENIFER ARBAUGH,

*Petitioner,*

v.

Y & H CORPORATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 701(b) of Title VII of the 1964 Civil Rights Act applies the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?

## PARTIES

The petitioner is Jenifer Arbaugh. The respondent is the Y & H Corporation, doing business as The Moonlight Cafe.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jenifer Arbaugh respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 2, 2004.

## OPINIONS BELOW

The August 2, 2004, decision of the Court of Appeals, which is reported at 380 F.3d 219 (5th Cir. 2004), is reprinted in the Appendix to the petition. (App. 1-27). The October 13, 2004, decision of the Court of Appeals, denying the petition for rehearing en banc, which is not officially reported, is reprinted in the Appendix. (App. 50). The April 30, 2003 decision of the District Court, 2003 WL 1797893 (E.D.La.), which is not officially reported, is reprinted in the Appendix to the petition. (App. 24-44). The December 27, 2002 order of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (App. 45-49).

## STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 2, 2004. A timely petition for rehearing en banc was denied on October 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(b), provides in pertinent part:

> The term "employer" means an employer engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

Section 703(f)(3) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3), provides in pertinent part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

Section 1331 of 28 U.S.C. provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

## STATEMENT OF THE CASE

In 2001 petitioner Jenifer Arbaugh commenced this action in federal district court against her former employer, Y & H Corporation.[1] The plaintiff alleged that she had been sexually harassed, that a co-owner of the firm had assaulted her while at work, and that these actions resulted in her constructive discharge. Plaintiff sought

[1] Petitioner also sued one of the owners of the corporation. The jury returned a verdict in favor of that defendant on that claim.

relief under Title VII of the Civil Rights Act of 1964 and under Louisiana tort law.

The defendant did not initially dispute either the applicability of Title VII or the subject matter jurisdiction of the court. After a jury trial, the jury found that plaintiff had been sexually harassed and constructively discharged, and awarded her $5,000 in back pay, $5,000 in compensatory damages, and $30,000 in punitive damages. The trial court entered judgment for plaintiff on November 5, 2002.

Fourteen days later, on November 19, 2002, the defendant filed a post-trial Motion to Dismiss for Lack of Subject Matter Jurisdiction. The defendant contended that during the relevant time period it had fewer than fifteen employees, and included with the post-verdict motion a detailed analysis of its payroll records. Section 701(b) of Title VII defines an "employer" subject to that title as an employer with fifteen or more employees. Because the defendant had not raised this contention prior to or at trial, it would ordinarily have been waived. However, the defendant contended that the lack of the requisite fifteen or more employees did not simply go to the merits of the claim, but rather deprived the district court of subject matter jurisdiction over the Title VII claim.

The district court agreed, holding that the fifteen-employee requirement in section 701(b) is indeed jurisdictional, and that the defendant could therefore raise this objection at any time in the proceedings, including after entry of judgment. The district court commented:

> It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The

> unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction w[h]ere it is lacking.

(App. 47).

The dispute regarding whether the defendant in fact had fifteen employees was referred, with the consent of the parties, to a Magistrate Judge instead of the District Judge. On April 4, 2003, five months after the original jury verdict and entry of judgment, the Magistrate Judge concluded that the defendant had fewer than fifteen employees during the relevant period of time. The district court then vacated the jury verdict in favor of plaintiff, and dismissed the entire action for lack of subject matter jurisdiction. (App. 24-44).

On appeal the threshold question raised by the parties, and addressed by the Fifth Circuit, was whether the fifteen-employee requirement in section 701(b) limits the subject matter jurisdiction of the federal courts. The parties[2] and the court[3] agreed that the courts of appeals other than the Fifth Circuit are divided as to whether the fifteen-employee rule is jurisdictional. In its opinion of August 2, 2004, the Fifth Circuit panel held that the fifteen-employee requirement is jurisdictional. (App. 5-9). The court of appeals affirmed as not clearly erroneous the district court's finding that the defendant in fact had fewer than fifteen employees. (App. 10-21).

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[2] Plaintiff-Appellant's Original Brief, pp. 15-20; Original Brief on Behalf of Defendants-Appellees, pp. 11-12.

[3] App. 5-7.

Plaintiff filed a timely petition for rehearing en banc, asking the Fifth Circuit to reconsider the panel's holding that the requirement of section 701(b) is jurisdictional. That petition expressly noted that the panel decision was in conflict with decisions in several other courts of appeal.[4] On October 13, 2004, the Fifth Circuit denied the petition for rehearing en banc.

## REASON FOR GRANTING THE WRIT

### I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED REGARDING WHETHER THE EMPLOYMENT NUMEROSITY REQUIREMENTS IN FEDERAL EMPLOYMENT LAWS ARE JURISDICTIONAL

The decision below is the latest iteration of a long-standing dispute among the lower courts regarding when elements of or restrictions on a federal claim are "jurisdictional." For years some lower courts have debated whether the statutory provisions establishing the elements of a federal claim merely govern the merits of those claims, or whether they also limit the subject matter jurisdiction of the federal courts. As this case starkly illustrates, whether or not such a statutory provision is deemed jurisdictional can in a variety of circumstances determine the outcome of litigation.

Much of this dispute, as in the instant case, has concerned federal statutes regulating employment practices. Several major federal employment statutes apply

[4] Petition for Rehearing En Banc, pp. 5-6.

only to employers which have a specified minimum number of employees. Title VII, for example, defines the "employer[s]" to whom it applies to include only employers which have at least fifteen employees. 42 U.S.C. § 2000e-(b).[5] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). The Fifth Circuit,[6] and several others,[7] hold that this employee numerosity requirement is jurisdictional; a comparable number of circuits insist, to the contrary, that this requirement is merely an element of the merits of a case.[8]

---

[5] The Americans With Disabilities Act applies to employers with fifteen or more employees. 42 U.S.C. § 12111(5). The Family and Medical Leave Act applies to employers with more than fifty employees. 29 U.S.C. § 2611(4). The Age Discrimination in Employment Act applies to employers with more than twenty workers. 29 U.S.C. § 630(b).

[6] App. 5-9; *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) ("the district court lacks subject matter jurisdiction over an employment agency that is sued in its capacity as an employer when the agency has fewer than fifteen employees."); *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989); *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974, 980 (5th Cir. 1980).

[7] *Ferroni v. Teamsters, etc., Local No. 22*, 297 F.3d 1146, 1151 (10th Cir. 2002); *Daggitt v. United Floor and Commercial Workers Int'l Union*, 245 F.3d 981, 985-86 (8th Cir. 2001); *Childs v. Local 18, Int'l Brotherhood of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Armbruster v. Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980).

[8] *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773, 777 (3d Cir. 2003); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3d Cir. 2003), *cert. denied*, 142 Sup. Ct. 1714 (2004); *Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996); *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

This problem and inter-circuit conflict are not limited to Title VII. The same question has arisen, and led to the same disagreement, with regard to the employee numerosity requirements of the Americans With Disabilities Act,[9] the Age Discrimination in Employment Act,[10] and the Family and Medical Leave Act.[11] An analogous problem has divided the lower courts regarding whether certain provisions in ERISA are jurisdictional.[12] Similar disputes have arisen regarding whether other provisions of federal employment statutes are jurisdictional.[13] The lower courts

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[9] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 and n. 1 (10th Cir. 2003) (ADA employee numerosity requirement is jurisdictional; noting "some disagreement among the circuits" about the issue); *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C. Cir. 1997) (ADA employee numerosity requirement is not jurisdictional).

[10] *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (ADEA employee numerosity requirement is not jurisdictional); *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987) (ADEA employee numerosity requirement is not jurisdictional).

[11] *Morrison v. Amway Corp.*, 323 F.3d 920, 928 n. 1 (11th Cir. 2003) (FMLA employee numerosity requirement not jurisdictional); *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (FMLA employee numerosity requirement is jurisdictional); *Douglas v. E.G. Baldwin & Associates*, 150 F.3d 604 (6th Cir. 1998) (FMLA employee numerosity requirement is jurisdictional).

[12] *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182 (2d Cir. 1996); *Bleiler v. Cristwood Construction, Inc.*, 72 F.3d 13 (2d Cir. 1995).

[13] *See Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001-02 (7th Cir. 2003) (whether employer is in an industry affecting commerce, and thus subject to Title VII, is not jurisdictional), *cert. denied sub nom. Apna Ghar, Inc. v. Johnson*, 540 U.S. 984 (2003); *EEOC v. The Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996) (whether employer is entitled to the Title VII exemption for private clubs is not jurisdictional); *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (whether the White House is an "executive agency" covered by Title VII is not jurisdictional); *Kicler v. Nimishillen and Tuscarawas Rwy. Co.*, 13 F.3d 184 (6th Cir.

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are divided on these questions as well, generally treating these other issues as controlled by their (conflicting) views regarding whether employee numerosity requirements are jurisdictional.

In addition to the Fifth Circuit in the instant case, the Fourth,[14] Sixth,[15] Eighth,[16] Ninth,[17] and Tenth[18] Circuits hold that employee-numerosity requirements in federal statutes are jurisdictional. On the other hand, the Second, Third, Seventh, Eleventh and District of Columbia Circuits insist that these requirements are not jurisdictional. The existence of this inter-circuit conflict is widely recognized.

The decision of the Fifth Circuit in the instant case is only the most recent in a series of Fifth Circuit decisions holding that the Title VII employee numerosity requirement is jurisdictional.[19] The panel decision below recognized

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1993) (whether a railroad is a "common carrier", and thus subject to the Federal Employers Liability Act, is a jurisdictional question); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) (whether plaintiff is an employee within the meaning of Title VII, the ADEA and the ADA is jurisdictional); *Woodard v. Virginia Board of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979) (whether state bar examiners could be considered "employer" of unsuccessful bar applicant was jurisdictional question).

[14] *Hukill v. Auto Care, Inc.*, 192 F.3d 437 (4th Cir. 1999) (FMLA).

[15] *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998); *Armbruster v. Quinn*, 711 F.3d 1332, 1334 (6th Cir. 1983).

[16] *Daggitt v. United Floor and Commercial Workers Int'l Union*, 245 F.3d 981, 985-86 (8th Cir. 2001).

[17] *Childs v. Local 18, Int'l Brotherhood of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983).

[18] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976 (10th Cir. 2003); *Ferroni v. Teamsters, etc., Local No. 22*, 297 F.3d 1146, 1151 (10th Cir. 2002); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980).

[19] *See* n. 6, *supra*.

the existence of the intercircuit conflict on this issue, and chose to adhere to Fifth Circuit precedent.

> Noting a circuit split on this issue, Arbaugh cites the Second Circuit. . . . Arbaugh relies also on the Seventh Circui[t]. . . .
>
> Defendants, on the other hand, simply argue that we must adhere to our Circuit precedent. . . . Defendants contend that while the Second, Seventh and Federal Circuits view the statutory definition of an employer as an issue which goes to the merits of the case, the Fifth Circuit is joined by five other circuits in concluding otherwise. . . .
>
> Because we are bound by our prior precedent, Arbaugh's argument that the census issue is not jurisdictional must fail.

(App. 5-7).[20]

Five circuits have expressly rejected the view of the Fifth Circuit.

The Second Circuit has noted the existence of this conflict and held that the Title VII employee numerosity requirement is not jurisdictional, expressly listing the Fifth Circuit among the courts of appeals with which it avowedly disagrees.

> The rulings in other circuits are mixed. The Seventh Circuit has ruled that the fifteen-employee requirement of Title VII is not jurisdictional . . .

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[20] The reference to a decision in the Federal Circuit is an error. The decision cited in the brief of the defendant was in the District of Columbia Circuit.

> and the District of Columbia Circuit, considering the same requirement of the Americans with Disabilities Act, . . . has also ruled that the requirement is not jurisdictional. . . .
>
> Other circuits, however, have ruled, with little or no discussion, that the requisite number of employees is jurisdictional in Title VII cases, *see* . . . *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198 (5th Cir. 1994). . . .
>
> Taking what we believe is an appropriately limited view of the nature of issues that should determine subject matter jurisdiction and examining the wording of Title VII's jurisdictional statute, we agree with the Seventh and District of Columbia Circuits that the threshold number of employees for application of Title VII is not a jurisdictional issue, at least so long as a plaintiff . . . makes a non-frivolous claim that the defendant is a covered employer.

*Da Silva v. Kinsho International Corp.*, 229 F.3d 358, 364-68 (2d Cir. 2002).[21]

The Third Circuit has recognized the conflict as well, and has rejected the Fifth Circuit rule.

> The question whether Title VII's fifteen-employee threshold is a jurisdictional prerequisite when a plaintiff brings a colorable Title VII claim has divided the courts of appeals. The Second and Seventh Circuits conclude that it is a substantive element that the plaintiff must

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[21] *See Bleiler v. Cristwood Construction, Inc.*, 72 F.3d 13, 15 n. 1 (2d Cir. 1995); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182 (2d Cir. 1996) (fact that employee had no right to benefits under ERISA related to merits of his claim, not subject matter jurisdiction of court).

> prove. . . . Moreover, the D.C. Circuit has held the Americans with Disabilities Act's . . . fifteen-employee threshold an element of the merits. . . . In this context, the ADA's fifteen-employee requirement is in all relevant respects indistinguishable from Title VII's.
>
> By contrast, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have said that the fifteen-employee threshold is jurisdictional. . . .
>
> Turning to Title VII, we note that those courts that have held the fifteen-employee requirement jurisdictional have provided no reasons for their holding; rather, they have assumed it so or stated the conclusion without meaningful analysis. Moreover, in reading 42 U.S.C. § 2000e(b) we perceive no congressional intent to make the requirement jurisdictional. . . .
>
> [W]e hold that . . . the fifteen-employee threshold is a substantive element (whether an "employer" exists) of a Title VII claim and is not jurisdictional.

*Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 77-84 (3d Cir. 2003) (footnote omitted), *cert. denied*, 142 Sup. Ct. 1714 (2004).[22]

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[22] The petitioner in *Nesbit* had prevailed in the Third Circuit on the issue of whether the employee numerosity requirement was jurisdictional, but nonetheless lost in the court of appeals because that court concluded that the defendant employer did not have fifteen employees, and that the action should therefore be dismissed on the merits.

> [W]e affirm the dismissal of Nesbit's complaint. But we part with the District court on the path to this result. It viewed

(Continued on following page)

The Seventh Circuit has repeatedly held that the employee numerosity requirement of Title VII and other federal statutes is not jurisdictional,[23] expressly overruling[24] an earlier Seventh Circuit decision to the contrary.[25]

> The parties made two assumptions in the district court that affect how this contention was resolved. The first is that the number of employees is a "jurisdictional" issue, which the district judge may decide under Fed.R.Civ.P. 12(b)(1) by receiving evidence and making findings. This assumption is incorrect. Sharpe presents a nonfrivolous claim under federal law; no more is necessary for subject matter jurisdiction. A plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement. There is a gulf between defeat on the merits and a lack of jurisdiction.

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Title VII's "fifteen or more" person requirement as jurisdictional. We affirm the dismissal of Nesbit's complaint on the merits rather than for lack of subject matter jurisdiction.

347 F.3d at 74-75.

The outcome in *Nesbit* ultimately turned on the fact-bound conclusion of both lower courts that, in determining whether Title VII applied, the defendant employer Gears Unlimited, Inc. (which admittedly had fewer than fifteen emloyees) should not be considered part of a single integrated employer together with a larger related entity. 347 F.3d at 84-89.

[23] *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998).

[24] *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996).

[25] *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir. 1993).

*Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998).

The Eleventh Circuit has also recognized the conflict on this issue, and held that employee numerosity requirements are not jurisdictional.

> We have surveyed the opinions of other circuits and note a split in authority regarding whether challenges to employer status under federal employment statutes are jurisdictional or intertwined with the merits. . . . In our view, those courts ruling the issue to be only jurisdictional have been fairly criticized as providing "little or no discussion" to explain their reasoning. Even if we were inclined to treat the issue as solely jurisdictional, we are bound by our precedent in *Garcia [v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997)] that holds otherwise.

*Morrison v. Amway Corp.*, 323 F.3d 920, 928 n. 11 (11th Cir. 2003). The earlier Eleventh Circuit decision in *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256, 1265 (11th Cir. 1997), had expressly relied on the 1986 Fifth Circuit decision in *Clark v. Tarrant County, Texas*, 798 F.2d 736, 742 (5th Cir. 1986). In the instant case, however, the panel below expressly disavowed *Clark* as inconsistent with prevailing Fifth Circuit precedent. (App. 7-8).

Finally, the District of Columbia Circuit has held that employee numerosity requirements are not jurisdictional, expressly rejecting the very Fifth Circuit decision, *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (5th Cir. 1980), relied on by the panel decision below. (App. 7).

> The question whether [the defendants] have enough employees to be covered under the ADA

> does not affect the jurisdiction of the district court. . . .
>
> We acknowledge that at least three circuits have treated the question whether an employer has sufficient employees to be covered under Title VII . . . as jurisdictional. . . . *Dumas v. Town of Mount Vernon, Alabama*. . . . Nevertheless, none of the courts has explained why the question is jurisdictional. Nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction. . . .
>
> If the [defendants] are not covered under the ADA, this fact does not preclude the district court from asserting jurisdiction.

*EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-24 (D.C. Cir. 1997). In a concurring opinion, however, Judge Sentelle, while acknowledging that he was bound by Circuit precedent in the District of Columbia Circuit, expressed personal agreement with the contrary rule in the Fifth Circuit.[26]

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[26] 117 F.3d at 626:

> "I . . . write separately . . . to express my misgiving about a point of previously established circuit law; that is, that the question of the number of employees goes to the sufficiency of a complaint under Rule 12(b)(6) as opposed to jurisdiction under Rule 12(b)(1). [A]s the majority notes, three other circuits have treated the employee numbering requirement drawn from . . . Title VII . . . as jurisdictional. . . . *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974, 979-80 (5th Cir. 1980). While it is true, as the majority notes, that none of the courts discussed why the question is jurisdictional, I nonetheless believe they have it right."

## II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT

The Fifth Circuit rule applied in the instant case, is squarely inconsistent with the standard for determining federal question jurisdiction utilized by this Court for almost half a century since *Bell v. Hood*, 327 U.S. 678 (1946). A district court has jurisdiction whenever "the right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." 327 U.S. at 683.

The *Bell v. Hood* standard is manifestly satisfied in a Title VII case such as this in which a plaintiff alleges that the employer had the requisite fifteen employees, regardless of whether that contention is ultimately sustained. In the instant case whether the defendant had fifteen employees turned on whether the company's drivers, or the wives of the company's owners, were "employees" within the meaning of section 701(f) of Title VII. (App. 10-21). The answer, and plaintiff's right to recover, were thus governed by an interpretation of section 701(f). The court below correctly observed that "whether a person is an employee under Title VII is a question of federal law . . . to be ascertained through consideration of the statutory language of the [Civil Rights] Act, its legislative history, existing federal case law, and the particular circumstances at hand." (App. 11, *quoting Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1159-60 (5th Cir. 1986).) In resolving whether the defendant was an employer within the meaning of Title

VII, the court below applied a seven-part legal standard from *Broussard*, an eleven-part legal standard from *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), and a six-part standard from *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). (App. 12-21). Because the outcome of the case obviously turned on the construction of a federal statute, there clearly was subject matter jurisdiction over the case.

The actual jurisdictional provision in Title VII, section 706(f)(2), is indistinguishable from the jurisdictional provision involved in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Section 706(f)(2) of Title VII provides:

> Each United States district court . . . shall have jurisdiction of actions *brought under* this title.

(Emphasis added). The jurisdictional provision of the statute in question in *Steel Company* provided:

> The district court shall have jurisdiction in actions *brought under* subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (Emphasis added). This Court made clear in *Steel Company* that such language did *not* mean that the court would lack subject matter jurisdiction if any of the elements of a claim were missing. "It is unreasonable to read this [section 11046(c)] as making all the elements of the cause of action under subsection [11046](a) jurisdictional." 523 U.S. at 1010-1012. If the acts about which the plaintiff in *Steel Company* complained did not

violate the commands of subsection 11046(a), that would mean only that the plaintiff would lose on the merits, but not that the court lacked subject matter jurisdiction under subsection 11046(c). "In referring to actions 'brought under' § 11046(a), § 11046(c) means suits *contending* that § 11046(a) contains a certain requirement." 523 U.S. at 1012 (Emphasis in original). Similarly, an employment discrimination action contending that a discriminatory defendant is an employer within the meaning of section 701(b) is an action "brought under" Title VII, and is thus within the jurisdictional grant of section 706(f)(2), even if that contention is ultimately unsuccessful.

In *Steel Company* this Court warned of the dangers of "drive-by jurisdictional rulings." 523 U.S. at 91. Federal courts at all levels have at times used the term "jurisdictional" in a profligate manner. *See Carlisle v. United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring). Issues had been labeled as jurisdictional in cases in which nothing of substance turned on that characterization. But, as explained *infra*, whether or not a statutory provision is indeed jurisdictional can have profound and dispositive impact on the litigation of other cases. For that reason, this Court in *Steel Company* admonished that casual dicta regarding whether an issue is jurisdictional should "have no precedential effect." 523 U.S. at 91.

The Fifth Circuit decision in this case flies in the face of that admonition. The panel below relied on a 1980 Fifth Circuit decision in *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (1980). The jurisdictional holding in *Dumas*, however, was precisely the sort of casual remark that *Steel Company* instructed the lower courts to disregard. After holding that the defendants in *Dumas* did not have the fifteen employees required under Title VII,

*Dumas* concluded that "dismissal of the Title VII claims against them *for lack of subject matter jurisdiction* was proper." 612 F.3d at 980 (Emphasis added). The inclusion in the opinion of these six italicized words had no operational significance in *Dumas* itself. But in the instant case, whose outcome turns on the very question of whether the employee numerosity requirement limits the subject matter jurisdiction of the court, the Fifth Circuit has attached conclusive precedential significance to precisely the sort of drive-by jurisdictional ruling in *Dumas* to which this Court has expressly objected.

The decision below is also inconsistent with this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In *Zipes* this Court rejected a similar contention that section 706(e) of Title VII, which establishes the time limit for filing a charge with EEOC, is jurisdictional. The Court held that the actual jurisdictional provision of Title VII, section 706(f), is distinct from the other procedural and substantive provisions of Title VII.

> The provision granting district courts jurisdiction under Title VII, [sections 706(f)], does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 393-94 (footnote omitted). Precisely the same is true of the relationship between section 706(f) (conferring jurisdiction over Title VII cases) and section 701(b)

(defining who is an "employer" subject to the requirements of Title VII). Section 706(f) confers jurisdiction over all actions "brought under" Title VII; it contains no reference to the Title VII definition of an employer, and is not limited to cases in which the plaintiff successfully meets that or any other requirement. Conversely, the definition of employer is in an entirely separate section; section 701(b), like section 706(e) in *Zipes*, "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."

## III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

As the Seventh Circuit has correctly observed, "[t]here is a gulf between defeat on the merits and a lack of jurisdiction." *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998). In this case, as in many others, that difference is outcome determinative.

Whether the employee numerosity requirement is jurisdictional determines whether, as occurred in the instant case, a defendant can postpone raising that issue until after it knows the outcome of a trial on the merits. If the employee numerosity requirement in Title VII is non-jurisdictional, any defense or objection on that basis in the instant case was indisputably waived. It was not until after the defendant had lost at trial, and judgment on the merits had been entered against it, that the defendant first asserted that it had too few employees to be an employer within the scope of Title VII.

On the other hand, a lack of subject matter jurisdiction, unlike issues which relate to the merits of a claim, is never subject to waiver or estoppel. "[S]ubject-matter

jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 625, 630 (2002). In the Fifth Circuit the Title VII employee numerosity requirement is deemed to limit the subject matter jurisdiction of the court. Thus in the Fifth Circuit, as occurred in this case, a defendant can await the outcome of the trial, and only after an adverse verdict choose to assert for the first time that it has too few employees to be covered by Title VII, and that the action thus is not within the subject matter jurisdiction of the court. This is similar to contention unsuccessfully advanced by the debtor in *Kontrick v. Ryan*, 540 U.S. 443 (2004). If the Fifth Circuit holding is correct, then a plaintiff too could utilize that tactic, waiting until the jury verdict to challenge the jurisdiction of the court.[27] Six circuits agree with the Fifth Circuit that the employee numerosity requirement is jurisdictional, and thus permit such tactics.

Whether or not a statutory element or requirement is jurisdictional can affect in several other ways the outcome of litigation. First, whether an issue is jurisdictional will at least usually control whether a court or a jury should resolve factual disputes bearing on that issue. In the instant case the plaintiff, who sought compensatory and punitive damages, had both a constitutional[28] and statutory[29] right to a jury trial on the disputed elements of that

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[27] That is precisely what occurred in *Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000).

[28] United States Constitution, Amend. VII.

[29] 42 U.S.C. § 1981a.

claim. When the defendant finally raised a dispute regarding whether it had sufficient employees to be subject to Title VII, however, the district court believed that this was a jurisdictional issue and therefore resolved the dispute itself. The district court's decision was upheld on appeal as not clearly erroneous. (App. 11, 15).[30] If, however, the employee numerosity requirement is not jurisdictional, the relevant factual disputes would have to be resolved by a jury.[31]

Second, whether or not the employee numerosity requirement is jurisdictional will often be of dispositive importance to the resolution of supplemental state law claims raised in the same action. If the plaintiff prevailed at trial on a supplemental state law claim, the later rejection of the federal claim will usually leave the state law verdict unaffected so long as the defect in the federal claim was non-jurisdictional. *See, e.g., Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000). But if the lack of employee numerosity is jurisdictional, then the court would also lack subject matter jurisdiction over the supplemental state law claim, no matter how closely

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[30] *See Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983) (holding that employee numerosity issue is jurisdictional, and remanding factual questions for resolution by the district judge).

[31] *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) (because FMLA employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (because ADEA employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Martin v. United Way of Erie County*, 829 F.2d 445, 451 (3d Cir. 1987) (because Title VII employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so).

related to the original federal claim, and the verdict on the state law claim – which itself may have had no employee numerosity requirement – would also have to be set aside.[32]

Third, if the employee numerosity requirement limits the subject matter jurisdiction of the court, the court must itself raise the issue, even if the parties agree, for example, that the employer has more than fifteen workers.[33]

> Such a holding would require a federal court to determine whether a company had fifteen employees during the relevant period, even if the parties so stipulated. To require a federal court to

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[32] *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1186 (2d Cir. 1996) ("Insofar as the district court previously determined that there was no original federal subject matter jurisdiction over the suit, it could not exercise supplemental jurisdiction over Nowak's state claims.") In *Nowak* the court of appeals concluded that the defect in the plaintiff's underlying ERISA claim was not jurisdictional, and that the exercise of supplemental jurisdiction was therefore permissible.

Conversely, in *Douglas v. E.G. Baldwin & Associates, Inc.*, the Sixth Circuit held that a district judge could not exercise supplemental jurisdiction over such a state claim because the lack of the requisite number of employees to support the federal FMLA claim deprived the court of subject matter jurisdiction.

If the employee numerosity requirement were jurisdictional, that would have serious implications for the timeliness of supplemental state law claims which a plaintiff sought to refile in state court after they had been dismissed by the federal court. It is unclear whether a plaintiff could invoke the tolling provision of section 1367(d) in a case in which there never had been subject matter jurisdiction over the underlying federal claim. *See Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002).

[33] The court of appeals did precisely that in *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998), dismissing the action because the defendant did not have the requisite number of employees, an issue "not raised by the parties." 150 F.3d at 605.

> engage in such a fact-intensive inquiry *sua sponte* – which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets – appears to be a waste of scarce judicial resources. . . .

*Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003), *cert. denied*, 124 Sup. Ct. 1714 (2004).[34]

Fourth, if the employee numerosity requirement were indeed jurisdictional, courts would be obligated to first consider and resolve this sometimes factually complex issue, even though other less difficult grounds for decision on the merits might be evident.

> To hold the requirement jurisdictional also implies that a court would need to decide whether an entity employed more than fifteen individuals before reaching a Title VII action's merits – even if the merits were more easily resolved than the "jurisdictional" question.

*Nesbit v. Gears Unlimited, Inc.*, 347 F.3d at 83.

By conflating the elements of a federal claim with the subject matter jurisdiction of the federal courts, the decision of the Fifth Circuit poses a serious threat to the efficient and predictable conduct of civil litigation. By permitting a defendant in this case to postpone raising its possible employee-numerosity defense until after the jury verdict, the court of appeals has invited defendants, and

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[34] *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998) ("Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail.")

plaintiffs, to use the same tactic in any of the six circuits that treat the employee-numerosity requirement as jurisdictional. The district court below, although bound by Fifth Circuit precedent, properly objected that allowing this tactic would be "unfair and a waste of judicial resources." (App. 47). Certiorari should be granted to address this important problem.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS,**
**For the Fifth Circuit.**

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No. 03-30365

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JENIFER ARBAUGH,

Plaintiff-Appellant,

VERSUS

Y&H CORPORATION, doing business as The Moonlight Café; and YALCIN HATIPOGLU,

Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed August 2, 2004)

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Before EMILIO M. GARZA, DeMOSS and CLEMENT, Circuit Judges.*

DeMOSS, Circuit Judge:

Jenifer Arbaugh filed suit against Y&H Corporation ("Y&H") and Yalcin Hatipoglu (collectively, "Defendants"), in November 2001, asserting claims under both Title VII of the Civil Rights Act of 1964 and Louisiana state tort law. After a two-day jury trial in October 2002, a verdict was returned in favor of Arbaugh. In November 2002, Defendants

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* Emilio M. Garza, Circuit Judge, concurring in the judgment only.

filed a motion to dismiss, contending that Y&H did not qualify as an "employer" under 42 U.S.C. § 2000e(b) because it did not employ 15 or more employees for 20 or more calendar weeks during the relevant time period. The district court ordered both parties to conduct post-trial discovery on the issue. In March 2003, the district court converted the motion to dismiss to a motion for summary judgment. Thereafter, in April 2003, the district court entered an order vacating and reversing Arbaugh's jury verdict and judgment based upon the determination that the court did not have subject matter jurisdiction. Arbaugh filed a timely notice of appeal.

## BACKGROUND AND PROCEDURAL HISTORY

Jenifer Arbaugh was employed as a bartender and waitress at the Moonlight Cafe, a New Orleans restaurant, from May 2000 until February 2001. During this time, Arbaugh alleges that Hatipoglu, one of Y&H's owners, continually subjected her to a sexually hostile environment. On November 8, 2001, Arbaugh filed suit in federal district court, in Louisiana, asserting claims against Y&H (the operator of the Moonlight Café) and Hatipoglu. Arbaugh alleged sexual harassment in violation of Title VII in addition to state tort law claims. Arbaugh asserted in her complaint that the court had subject matter jurisdiction over her Title VII claim pursuant to 28 U.S.C. § 1331, which confers federal question jurisdiction.[1] Arbaugh further stated in her complaint that she had satisfied the Title VII prerequisite for filing a charge with the

[1] Arbaugh also averred that the court had supplemental jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367.

Equal Employment Opportunity Commission ("EEOC") and received a "Right to Sue" notice less than 90 days prior to filing her suit in district court.

The parties consented to have the matter heard before a magistrate judge pursuant to 28 U.S.C. § 636(c).[2] Over the course of two days in October 2002, the parties presented evidence to a jury. The jury returned a verdict in favor of Arbaugh, awarding her $5000 in back-pay, $5000 in compensatory damages, and $30,000 in punitive damages. The district court entered final judgment for Arbaugh on November 5, 2002. On November 19, 2002, Defendants filed a motion pursuant to Fed. R. Civ. P. 12(h)(3), in which they sought to dismiss the case for lack of subject matter jurisdiction. Specifically, Defendants argued that during the relevant years Arbaugh was employed there, the Moonlight Cafe did not employ 15 or more employees for 20 calendar weeks, thus exempting it from Title VII coverage. In March 2003, the district court converted Defendants' motion to dismiss to a motion for summary judgment and ordered both parties to conduct additional post-trial discovery and submit supplemental memoranda to support their respective positions.

On April 4, 2003, the district court granted Defendants' motion and vacated and reversed Arbaugh's jury verdict and judgment. In its order and reasons, the district court determined that Defendants did not employ the requisite 15 or more persons during the relevant time periods, explaining that this calculation was exclusive of Y&H's delivery drivers, the two owners of Y&H, and their

[2] This opinion will refer to the magistrate judge as the district court and her rulings as decisions issued by the district court.

wives. The district court noted in its order that had the delivery drivers, the two owners, or their wives counted as employees, Defendants would have been subject to the statutory framework of Title VII. Arbaugh timely filed the instant appeal.

## STANDARD OF REVIEW

We review dismissals for lack of subject matter jurisdiction *de novo*, using the same standards as those employed by the lower court. *Beall v. United States*, 336 F.3d 419, 421 (5th Cir. 2003); *McAllister v. FDIC*, 87 F.3d 762, 765 (5th Cir. 1996). We must take as true all of the complaint's uncontroverted factual allegations. *John Corp. v. City of Houston*, 214 F.3d 573, 576 (5th Cir. 2000). Likewise, this court reviews grants of summary judgment *de novo*, applying the same standard as the district court. *Tango Transp. v. Healthcare Fin. Servs. LLC*, 322 F.3d 888, 890 (5th Cir. 2003). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court views the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the non-movant "fails to make a showing sufficient to establish the existence of

an element essential to that party's case." *Celotex,* 477 U.S. at 322.

## DISCUSSION

### I. Whether the district court erred in ruling that the number of Defendants' employees determined subject matter jurisdiction rather than an issue going to the merits.

Arbaugh argues that the threshold issue is not whether Y&H employed 15 or more employees during the relevant time period, but rather whether the employee census finding is relevant to subject matter jurisdiction or whether that determination goes to the merits of the case. Arbaugh argues that while the Fifth Circuit has concluded this issue determines subject matter jurisdiction, this court's rulings do not provide an explanation supporting its conclusion.

Noting a circuit split on this issue, Arbaugh cites the Second Circuit for its observation that:

> Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question. Court decisions often obscure the issue by stating that the court is dismissing "for lack of jurisdiction" when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.

*Da Silva v. Kinsho Int'l Corp.,* 229 F.3d 358, 361 (2d Cir. 2000).

Arbaugh relies also on the Seventh Circuit's determination that a plaintiff who files a non-frivolous suit in

federal court without more imparts the court with subject matter jurisdiction. *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998), *abrogated on other grounds, Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939-40 (7th Cir. 1999). Finding that "[a] plaintiff's inability to demonstrate that the defendant has 15 or more employees is just like any other failure to meet a statutory requirement," the Seventh Circuit opined: "Surely the number of employees is not the sort of question a court (including [an] appellate court) must raise on its own, which a 'jurisdictional' characterization would entail." *Sharpe,* 148 F.3d at 677-78. Arbaugh contends that because she presented to the district court a non-frivolous claim based in part on federal law, without demonstrating anything more, this court is vested with subject matter jurisdiction.[3] Arbaugh suggests that because this court has not examined the census/jurisdiction issue sufficiently, we should adopt the well-reasoned approach that the Second, Seventh, and Federal Circuits have followed, and likewise conclude that

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[3] Arbaugh also raises judicial economy considerations, noting that the lack of subject matter jurisdiction may be raised at any time, even after a trial on the merits has concluded. She asserts that not only does this circumstance create a waste of judicial resources, but it also presents a situation where a plaintiff's state law claims may be time-barred.

In *Jinks v. Richland County, S.C.*, 538 U.S. 456, 462-65 (2003), however, the Supreme Court recently confirmed the constitutionality of 28 U.S.C. § 1367(d), which provides that state law claims before a federal court pursuant to supplemental jurisdiction are tolled during the pendency of the federal suit. *See* 28 U.S.C. § 1367(d)(2000). Specifically, section 1367(d) declares that such state law claims "shall be tolled while the [federal] claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." *Id.* § 1367(d).

the census issue goes to the merits of an employment discrimination case.

Defendants, on the other hand, simply argue that we must adhere to our Circuit precedent, established in *Dumas v. Town of Mt. Vernon,* 612 F.2d 974, 980 (5th Cir. 1980), and followed by *Womble v. Bhangu,* 864 F.2d 1212, 1213 (5th Cir. 1989), and *Greenlees v. Eidenmuller Enters., Inc.,* 32 F.3d 197, 198 (5th Cir. 1994), that a failure to qualify as an "employer" under Title VII deprives a district court of subject matter jurisdiction. Defendants contend that while the Second, Seventh, and Federal Circuits view the statutory definition of an employer as an issue which goes to the merits of the case, the Fifth Circuit is joined by five other circuits in concluding otherwise. Specifically, the Fourth, *Hukill v. Auto Care, Inc.,* 192 F.3d 437, 441-42 (4th Cir. 1999), the Sixth, *Armbruster v. Quinn,* 711 F.2d 1332, 1335 (6th Cir. 1983), the Ninth, *Childs v. Local 18, Int'l Bhd. of Elec. Workers,* 719 F.2d 1379, 1382 (9th Cir. 1983), the Tenth, *Owens v. Rush,* 636 F.2d 283, 287 (10th Cir. 1980), and the Eleventh Circuit, *Scarfo v. Ginsberg,* 175 F.3d 957, 960 (11th Cir. 1999), have all concluded that the "employer" definition creates a jurisdictional requirement.

In an attempt to circumvent the *Dumas/Womble/Greenlees* line of cases, Arbaugh cites *Clark v. Tarrant County, Texas,* 798 F.2d 736, 741-42 (5th Cir. 1986), in which this court held that where questions concerning subject matter jurisdiction are intertwined with the merits, a Title VII claim should not be dismissed for lack of subject matter jurisdiction unless the claim is frivolous or clearly excluded by prior law. In *Clark,* the district court granted the defendants' motion for summary judgment, finding that the plaintiffs' employment positions came within the personal staff exemption of Title VII, thus

nullifying the claim. *Id.* at 740. In reversing the district court, the *Clark* court first determined that subject matter jurisdiction and the merits are "considered intertwined where the statute provides both the basis of federal court subject matter jurisdiction and the cause of action." *Id.* at 742 (citing *Sun Valley Gas. v. Ernst Enters., Inc.,* 711 F.2d 138, 139 (9th Cir. 1983)). The court in *Clark* concluded:

> The determination of whether appellants come within an exception of Title VII is intertwined with the merits of the Title VII claim. Where the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiff's federal claim is neither insubstantial, frivolous, nor made solely for the purpose of obtaining jurisdiction, the district court should find that it has jurisdiction over the case and deal with the defendant's challenge as an attack on the merits.

*Id.* (citation omitted).

However, we find the holding in *Clark* not to be controlling. *Clark* was decided in 1986, approximately six years after this court had previously issued its opinion in *Dumas. Dumas* involved a determination of, *inter alia,* whether the defendants satisfied the statutory definition of an "employer," thus establishing a basis for liability under Title VII. 612 F.2d at 979-80. After finding that the defendants did not employ the requisite number of employees during the relevant time periods, the *Dumas* court held that "dismissal of the Title VII claims against [defendants] for lack of subject matter jurisdiction was proper." *Id.* at 980.

Because we are bound by our prior precedent, Arbaugh's argument that the census issue is not jurisdictional

must fail. *See United States v. Lee*, 310 F.3d 787, 789 (5th Cir. 2002) (citing *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001)) ("[A] panel of this court can only overrule a prior panel decision if 'such overruling is unequivocally directed by controlling Supreme Court precedent.'" (citation omitted)). We must adhere to the well-established rule that "in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, this panel is bound by circuit precedent." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 n.3 (5th Cir. 1998); *see also Gandy v. State of Ala.*, 569 F.2d 1318, 1325 n.11 (5th Cir. 1978) ("This panel is bound by a prior panel's decision in the absence of intervening en banc reconsideration or Supreme Court precedent.") (citation omitted). To the extent that *Clark* conflicts with our long-standing precedent first enunciated in *Dumas*, it is not binding precedent in this Circuit.[4] Under our prior precedent rule, "[o]ne panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the Court en banc can do this." *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). Because the precise issue before us was decided in *Dumas* six years before *Clark*, and because *Clark* was neither a Supreme Court case nor an en banc decision, we are bound by the holding in *Dumas* that the employee census finding is determinative of subject matter jurisdiction.

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[4] We observe that no court in this or any other circuit has cited *Clark* for the proposition that Arbaugh seeks this court to adopt here.

## II. Whether the district court erred in ruling that Defendants employed fewer than 15 employees.

Having concluded that the employee census issue is determinative of subject matter jurisdiction, we shift our analysis to whether Defendants employed the requisite number of employees during the relevant time periods. Arbaugh argues that the jury's verdict should be reinstated because Y&H did in fact employ 15 or more employees during 2000 and 2001, maintaining that the delivery drivers, the owners of Y&H, and their wives were Y&H's employees.

### 1. The Drivers

Arbaugh contends that the district court erred in concluding that the delivery drivers were not "employees" as defined by Title VII. Arbaugh first directs us to evidence she presented to the district court concerning the work schedules created by Defendants in which the drivers were assigned schedules identical to those maintained for other employees at the restaurant, *i.e.,* the kitchen and restaurant staff. Arbaugh notes that the drivers were paid $4.00 per hour and were expected to work all of the hours in their respective shifts. In addition, Arbaugh argues that the drivers, like all other employees, used Defendants' computer to record the beginning and end of their shifts. She also presented evidence that Defendants prohibited the drivers from performing work for any other employer during their shifts, regardless of whether there were orders to be delivered. Arbaugh points to evidence suggesting that when drivers were not delivering orders, they were required to perform other work at the restaurant, which included, *inter alia,* cleaning, replenishing condiments, and helping prepare salads and desserts to be

included in home deliveries. Arbaugh concedes that the drivers did not appear on the payroll records nor did they have the proper tax deductions taken from their wages.

Defendants maintain that the drivers who delivered food for Y&H were not "employees" for Title VII purposes, but rather independent contractors. In support of their argument, Defendants cite *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986), and the "economic realities" test enunciated therein for determining whether an individual is an employee under Title VII.

While we review a district court's findings of fact for clear error, we review a district court's ultimate determination of employee status *de novo*. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993). We first observe that Title VII defines an "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (2000) (pending legislation). Recognizing the circularity in such a definition, the Supreme Court explained that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (citations and quotations omitted). The Fifth Circuit has recognized that "whether a person is an employee under Title VII is a question of federal law . . . to be ascertained through consideration of the statutory language of the [Civil Rights] Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Broussard*, 789 F.2d at 1159-60 (citation and quotations omitted).

It is well-settled in this Circuit that we determine whether a plaintiff is an "employee" for Title VII purposes by applying the hybrid economic realities/common law control test first advanced in *Spirides v. Reinhardt,* 613 F.2d 826, 831 (D.C. Cir. 1979), and first adopted by this Court in *Mares v. Marsh,* 777 F.2d 1066, 1067-68 (5th Cir. 1985). *See also Broussard,* 789 F.2d at 1160. Although other factors are relevant, the most important factor is "the extent of the employer's right to control the 'means and manner' of the worker's performance." *Bloom v. Bexar County, Tex.,* 130 F.3d 722, 726 (5th Cir. 1997) (citation omitted); *see also Broussard,* 789 F.2d at 1160. The factors pertinent to this inquiry include: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of the job commitment; (7) form of payment; and (8) directions on schedules and on performing work. *Broussard,* 789 F.2d at 1160.

Citing the above factors, the district court found that all eight factors weighed against a finding of control by Y&H. We agree. We begin our review by noting that the parties do not dispute that the first four *Broussard* factors support Defendants' contention that Y&H did not exercise control over the delivery drivers. Specifically, all of the drivers owned their own vehicles necessary to make the deliveries for Y&H. The drivers were responsible for all operating costs and for license fees and taxes, as well as for obtaining and maintaining the proper insurance for their vehicles. In addition, all drivers provided for the

maintenance and operating supplies associated with the care of their vehicles.

With regard to the drivers' ability to influence their profits, there was testimony elicited at trial revealing that the drivers were given at least two incentives to maximize the number of deliveries they made, thereby increasing their income: an incentive bonus based on the total dollar value of all deliveries made during their shifts and the income from tips, of which they received 100%.[5] Therefore, the more deliveries a driver made during a shift, the more money they could potentially earn, thus enabling the driver to maximize their profits.

As for the length of the job commitment, the *Broussard* court concluded the plaintiffs were not employees, finding it persuasive that the plaintiffs worked "off and on" for a year and that they also worked for nine other companies during this time. 789 F.2d at 1160. While the parties do not dispute that the drivers were expected to work all of the hours in their respective shifts, there is no evidence that the drivers were prohibited from working elsewhere when not on duty at Y&H. At trial, testimony was presented indicating that some of the drivers in fact worked other jobs.

With respect to the form of payment, the drivers were paid $4.00 per hour and retained 100% of the tips they received while making deliveries. Most drivers earned the majority of their income from tips. For tax purposes, the drivers were issued a Form 1099, as opposed to a Form W-2,

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[5] The drivers were also able to influence their profits by controlling the expenses associated with the vehicle they chose to drive and the amount they chose to spend on operation and maintenance.

which the kitchen and restaurant staff received. While Y&H withheld the appropriate federal and state income taxes and paid social security taxes on its kitchen and restaurant staff, it did not do so with its delivery drivers.

The parties presented the district court with conflicting evidence as to the direction Y&H provided the drivers as to both their schedules and the performance of their duties. Arbaugh maintained that Y&H, without input from the drivers, assigned the drivers to specific work schedules which were identical to the schedules it had for other employees. For purposes of establishing that Defendants exercised control over the performance of the drivers' duties, Arbaugh submitted evidence that: (1) the drivers used Y&H's computer to record the start and finish times for their shifts; (2) Defendants required the drivers to work solely for them during the entirety of the their shifts regardless of whether there were orders to deliver; (3) the drivers were responsible for preparing condiments and salads to be included in the orders that came into the restaurant; and (4) the drivers were required to clean their work stations at the end of their shifts.

Conversely, Defendants contend that the schedule making was a collaborative effort between Y&H and the drivers. Defendants insist that the drivers would inform Y&H of the days and times they could work, and based on that information, work schedules for the drivers were prepared and posted. With respect to the control Y&H had over the drivers' performance, Defendants concede the four points raised above by Arbaugh, but insist that: (1) during slow periods the drivers would watch television; (2) the drivers never waited on customers in the restaurant or performed any other duties to assist in the operation of the restaurant; (3) once a driver picked up an order from the

kitchen for delivery, it was the driver's responsibility to determine the route and manner of delivery; and (4) neither Hatipoglu nor Khaleghi supervised the drivers while they made their deliveries.

The district court concluded that, even taking as true Arbaugh's version of the facts concerning the setting of the schedules, the evidence failed to demonstrate that Y&H exercised the requisite control over its delivery drivers. Specifically, the district court found that Arbaugh "misunderstands the control factor," citing both *Broussard* and *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D. La. Mar.30, 2000), in support of its conclusion. In *Cole*, the district court found the plaintiff, who contracted with the defendant to provide motor carrier transport to the defendant's customers, was not an employee of the defendant, concluding:

> Last, and most important, although Venture directed when and where plaintiff picked up and delivered cargo, plaintiff alone controlled the manner and means in which she performed her work, including the method of transport, the operation of her vehicle, the route selected, and the selection, hiring and firing of drivers.

2000 WL 335743, at *4. Likewise, in *Broussard*, this court responded to a truck driver's allegation that she was an employee because of the extensive direction she received in terms of what to do and when to do it, by stating, "[s]he misses the point: she does not really claim direction on how to *operate* her truck." 789 F.2d at 1160 (emphasis added).

We agree with the district court. Reviewing the district court's factual findings for clear error, we conclude

that the district court engaged in a thoughtful, well-reasoned analysis in determining that because the drivers controlled the manner and means by which they operated their vehicles and selected their routes, Y&H did not exercise a right of control over the drivers' performance.

This Circuit has also recognized the additional factors identified in *Spirides* that are relevant to this inquiry, including:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;" (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

*Broussard,* 789 F.2d at 1160 (quoting *Spirides,* 613 F.2d at 832). The district court cites all *Spirides* factors as supporting its conclusion that the drivers were not employees of Y&H. Again, we agree.

It is clear that at least four of these factors weigh heavily against a finding that the delivery drivers are employees, including the fact that: (1) Y&H did not provide the equipment used by the delivery drivers; (2) the

delivery drivers did not receive annual leave; (3) the delivery drivers did not accumulate retirement benefits; and (4) Y&H did not pay the drivers' social security taxes. Also, as mentioned in our discussion of the *Broussard* factors, there was insufficient evidence in the record establishing that the delivery drivers operated under the direction of a supervisor or that the method of payment was indicative of an employer-employee relationship.

While it may be questionable as to whether any particular "skill" is required in making the deliveries, this factor alone is not dispositive. In addition, although the record demonstrates that each party was capable of terminating the working relationship, we find this determination to be inconclusive. Finally, as to the intention of the parties, the record is void of any type of employment agreement defining the relationship between Y&H and the delivery drivers. In the absence of such documentation, we look to the conduct of the parties in determining their common intent. The parties' relevant conduct reveals Y&H's non-withholding of taxes, its non-payment of social security taxes, the drivers' retention of the tips they earned, and the drivers' payment of their automobile expenses, including mileage. This evidence clearly supports the position that the parties did not intend for there to be an employer-employee relationship.

In sum, determining whether an individual is an "employee" for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (quotations omitted). However, in the instant case, we are persuaded that the great majority of facts in the record support the conclusion that the delivery drivers

were not employees of Y&H. Consequently, unless Y&H's owners or their wives are found to be employees, Y&H did not employ 15 or more employees during the relevant time periods as required for establishing liability under Title VII.

2. The Owners and Their Wives[6]

Arbaugh argues that the owners' wives should be counted as "employees" under Title VII, suggesting that the manner in which they were treated by Y&H is evidence of the alleged employer-employee relationship. Specifically, Arbaugh contends that this evidence includes the fact that the wives: (1) received a salary for their "advertising and publicity" work on behalf of the restaurant; (2) were included on the payroll register; and (3) had the proper taxes deducted from their wages. Arbaugh maintains that because the wives performed services for Y&H and were compensated for those services, the district court erred in not counting them as employees. Defendants respond by insisting that the wives, along with their husbands, *are* the owners of Y&H. As such, Defendants argue that the wives cannot be counted as employees in light of Supreme Court's recent decision in *Clackamas Gastroenterology Associates., P.C. v. Wells,* 538 U.S. 440 (2003).

[6] Arbaugh concedes that the Supreme Court's recent decision in *Clackamas Gastroenterology Associates., P.C. v. Wells,* 538 U.S. 440, 449-51 (2003), in which it was determined that director-shareholders of a medical clinic are not "employees" under the Americans with Disabilities Act, strongly suggests that Hatipoglu and Khaleghi themselves are not "employees." As such, Arbaugh focuses her appeal on the owners' wives.

In *Clackamas,* decided after the district court issued its order dismissing Arbaugh's suit, the Supreme Court was faced with whether, in the context of a discrimination suit filed against a medical clinic, the director-shareholder physicians could be counted as employees for purposes of determining whether the professional corporation was subject to the Americans with Disabilities Act. *Id.* at 442. The Court adopted the following six-factor inquiry advanced by the EEOC as to whether a director-shareholder is an employee:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2] Whether and, if so, to what extent the organization supervises the individual's work;
>
> [3] Whether the individual reports to someone higher in the organization;
>
> [4] Whether and, if so, to what extent the individual is able to influence the organization;
>
> [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization.

*Id.* at 449-50 (quotations and citation omitted). The Court recognized that whether a director-shareholder is an employee "depends on all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451 (internal quotation marks and citation omitted).

In its ruling, the district court, without the guidance of *Clackamas,* observed again that this Circuit has adopted the economic realities test to resolve whether a person is an employee for purposes of Title VII. It was deduced that this Circuit would look to the same test to determine whether a person is a partner or an employee of a corporation. The district court first concluded that Hatipoglu and Khaleghi themselves were not employees for Title VII purposes. It found that Hatipoglu and Khaleghi were partners who divided the profits and the responsibilities of running the business equally. The district court also found convincing Defendants' argument that no one other than themselves had control over all aspects of the business.

With regard to the two wives, the district court observed that neither did any work at the restaurant. The only services recognized by the district court were the occasional advertising and promotional work they performed. The district court determined that in applying all the factors of the economic realities test, the only one favoring a finding of an employment relationship was that social security taxes were paid on their income from the business. The district court therefore concluded that the wives were passive partners rather than employees.

Applying the six-factor test established in *Clackamas* to the facts in the instant case, we conclude that the district court ultimately reached the correct result, albeit based on different reasoning. First, it is unlikely that Y&H could hire or fire any of these four individuals. Instead, Hatipoglu, Khaleghi, and their respective wives are partners who, if it was decided that the working relationship was unpalatable, would have to engage in a dissolution process in accordance with the corporate structure

under which they were originally organized.[7] Second, there is no evidence demonstrating that the wives were supervised in their advertising and promotional work, nor is there any indication that they reported to anyone higher in the organization.

There is no evidence in the record as to whether either wife had any influence over Y&H's operations. With regard to the intention of the parties, the wives were not designated as employees either in written agreements or contracts. In fact, there is no record evidence evincing any intended nature or scope of employment. Finally, the record clearly establishes that the wives, along with their husbands, shared alike in Y&H's profits, losses, and liabilities.

As such, although the district court did not have the direction provided by *Clackamas* at the time it issued its order, we conclude that the district court nevertheless properly determined that Hatipoglu, Khaleghi, and their respective wives should not be counted as employees for purposes of determining Title VII liability.

## CONCLUSION

Having carefully reviewed the record of this case, the parties' respective briefing and arguments, and for the reasons set forth above, we find the district court properly followed our Circuit precedent in concluding that the number of employees determines a court's subject matter jurisdiction in a suit filed pursuant to Title VII. Second, the district court correctly concluded that neither the

[7] Y&H was organized as a Subchapter S corporation.

delivery drivers, nor the owners of Y&H, nor their wives should be counted as employees. While the district court's conclusion with regard to the owners and their wives was based on the economic realities test, the same conclusion is reached pursuant to the six-factor inquiry recently announced by the Supreme Court in *Clackamas*. Because it is undisputed that Y&H did not employ the requisite 15 employees without the inclusion of the drivers, the owners, or their wives, Defendants are not subject to liability under Title VII, and thus the district court properly dismissed Arbaugh's suit for lack of subject matter jurisdiction.

**AFFIRMED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| JENIFER ARBAUGH | CIVIL ACTION |
| VERSUS | NO: 01-3376 |
| Y & H CORPORATION, et al | SECTION: "R"(1) |

JUDGMENT

(Filed Apr. 3, 2003)

Considering the order and reasons this date,

IT IS ORDERED that the judgment of November 4, 2002 in favor of the plaintiff, Jenifer Arbaugh, and against the defendants, Y&H Corporation and Yalcin Hatipoglu (Rec. doc. 38), is VACATED.

IT IS FURTHER ORDERED that the [sic] there be judgment in favor of the defendants and against the plaintiff DISMISSING WITH PREJUDICE her claims pursuant to Title VII and DISMISSING WITHOUT PREJUDICE her claims pursuant to Louisiana law, with the parties to bear their own costs.

New Orleans, Louisiana, this 2 day of April, 2003.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| JENIFER ARBAUGH | CIVIL ACTION |
| VERSUS | NO: 01-3376 |
| Y&H CORPORATION, et al | SECTION: "R"(1) |

**ORDER AND REASONS**

(Filed Apr. 3, 2003)

Before the undersigned is the motion of the defendants, Y&H Corporation ("Y&H"), the operator of the Moonlight Café, and Yalcin Hatipoglu ("Hatipoglu"), one of Y&H's shareholders, to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(h)(3). The motion was converted to a motion for summary judgment, pursuant to Fed. R. Civ. P. 56. For the following reasons, the motion is granted.

PROCEDURAL BACKGROUND

The plaintiff, Jennifer Arbaugh ("Arbaugh"), filed this action on November 18, 2001, asserting claims under Title VII and Louisiana law. Arbaugh alleged that during her employment at the Moonlight Café, as a bartender and waitress, she was discriminated against because of her sex in that she was exposed to a hostile working environment and that in February, 2001, she was forced to resign because of the actions of Hatipoglu. Rec. doc. 1. The parties consented to trial before a Magistrate Judge. Rec. doc. 6. The action was tried before a jury on October 28 and 29, 2002, and there was a verdict for Arbaugh. Rec. docs. 33 and 36. A judgment was entered in favor of Arbaugh and against the defendants. Rec. doc. 38.

On November 19, 2002, the defendants filed the motion to dismiss contending that Y&H does not qualify as an "employer" under 42 U.S.C. § 2000e(b). Specifically, Y&H argues that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001. On December 26, 2002, the court rejected Arbaugh's contentions that the motion be denied because the defendants admitted subject matter jurisdiction was present. Rec. doc. 56. Because the burden was on Arbaugh to show that subject matter jurisdiction was present, she was given an opportunity to conduct discovery. *Id.* The parties completed the discovery and filed supplemental memoranda with exhibits on the jurisdictional issues. Rec. docs. 57 and 58.

The parties submitted: (1) affidavits from Hatipoglu and Hassan Khaleghi, both shareholders of Y&H; (2) Y&H's payroll records for 2000 and 2001; (3) Y&H work schedules for delivery drivers for January 29 through February 18 for an unidentified year; (4) Y&H schedules for the persons working in the kitchen and waiting tables; (4) affidavits from Sharon Davidson and Kevin Brown, delivery drivers for the Moonlight Café; and (5) Khaleghi's deposition. After reviewing the evidence, the court determined that additional evidence was required regarding compensation received by Hatipoglu and Khaleghi and their spouses in 2001. The parties were order [sic] to submit supplemental memoranda with evidence to resolve this issue. The parties were notified that the defendants' motion to dismiss was converted to a motion for summary judgment. Rec. doc. 59. Arbaugh and the defendants submitted supplemental memoranda. Rec. docs. 60 and 61. Arbaugh submitted an affidavit from Mark Brown, a former delivery driver for Y&H, the W-2 forms for 2001 for

Hatipoglu, Khaleghi and their spouses and their 2001 income tax returns. Rec. doc. 60. The defendants also submitted the W-2 forms and income tax returns for 2001 with an affidavit from Khaleghi.

## STATEMENT OF THE ISSUES

For purposes of this action, Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person." 42 U.S.C. § 2000e(b). The parties agree that the years 2000 and 2001 are the relevant time frame.

> The payroll method is the test used to determine whether an entity meets the requisite employees to qualify as an employer under Title VII. Under this test, all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. . . . What is ultimately critical is the existence of an employment relationship, as is most readily demonstrated by an individual's appearance on the employee's payroll. An employee who works irregular hours, perhaps only a few days a month, will be counted. Thus, some part-time workers may be counted as employees. On the other hand, an individual who appears on the payroll but is not an employee under traditional principles of agency law . . . would not count.

*Taylor v. Eastside Auto, Truck and Tire Repair,* 2001 WL 214032, *2 (E.D.La.) (Africk, M.J.) (citations, quotation marks and brackets omitted). The defendants contend that Y&H's payroll journals for 2000 and 2001 demonstrate

that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001. Arbaugh replies that the defendants failed to count the drivers, who made deliveries for the restaurant, and the owners of Y&H, Hatipoglu and Khaleghi and their spouses.

## UNDISPUTED FACTS

In 1996, Hatipoglu and Khaleghi organized Y&H as a Louisiana corporation under Subchapter S of the Internal Revenue Code. Hatipoglu and Khaleghi are the only officers and directors of the corporation. Hatipoglu, Khaleghi and their spouses are the only shareholders. Exhibits A and B to Rec. doc. 44. Y&H's only activity is the operation of the Moonlight Café. Rec. doc. 58 at Exhibit D at 5.

The Y&H payroll journals reflect that it did not employ fifteen or more persons, exclusive of the delivery drivers and the four owners, for twenty or more calendar weeks in either 2000 or 2001.[1] If either the delivery drivers or the four owners are counted with the persons shown on the payroll journals, then Y&H employed fifteen or more persons for the requisite time. Exhibit C to Rec. doc. 44.

The amount paid by Y&H to Hatipoglu, Khaleghi and their spouses in calendar year 2000 totaled $60,000 per

[1] There were four weeks in calendar year 2000 where Y&H had sixteen employees, exclusive of the drivers and the shareholders. For the remaining weeks of 2000 Y&H employed between eight and fourteen persons. In 2001, Y&H employed as many as nine persons and as few as three persons, exclusive of the drivers and the shareholders. Exhibit C to Rec. doc. 44.

couple.[2] This was paid to them biweekly, except for the biweekly periods ending on July 30 and August 13, 2000. Exhibit C to Rec. doc. 44. In calendar year 2001, the couples each received $29,117. Their tax returns listed $2,500 of this income as wages and the remainder was reported as income from a subchapter S corporation. Exhibit B-2 at Rec. doc. 61. In calendar year 2001, Lisa Hatipoglu also received $21,464 in wages from the Orleans Parish School Board. *Id.*

Khaleghi describes himself and Hatipoglu as partners in Y&H. Rec. doc. 58 at Exhibit D at 5. During the applicable years, they managed the restaurant and did whatever was required to keep it going. *Id.* at 6. For example, Hatipoglu and Khaleghi sometimes worked as delivery drivers. Rec. doc. 57 at Exhibit C. They generally worked alternate days at the restaurant unless the demands of the business required them both to be present. Rec. doc. 58 at Exhibit D at 6. The sole source of their income was the restaurant. *Id.* at 6-7. Lisa Hatipoglu and Zoreh Khaleghi did not work at the restaurant, but they occasionally did advertising and promotion work. *Id.* at 19-20. The compensation that the spouses received was not determined based on the time they worked on advertising and promotion. They received their compensation regardless of whether they did advertising or promotion work in a given pay period. *Id.* at 22. The purpose of the compensation was to allow them to be eligible for Social Security benefits. *Id.* at 22-23. On their 2001 income tax returns the payments

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[2] Tax returns for that year were not produced. It is assumed, based on a review of the payroll records, that all income was reported as wages rather than income from the Subchapter S corporation.

to the spouses were reported as wages. Exhibit B-2 at Rec. doc. 61.

The delivery drivers owned their vehicles and were responsible for: (1) all maintenance and operating costs, including insurance, for their vehicles; and (2) taxes, licenses and fees associated with their vehicles and their ability to drive. Rec. doc. 58 at Exhibits A-C. Y&H did not provide the delivery drivers with any annual leave or retirement benefits. *Id.* Y&H did not pay Social Security taxes for the delivery drivers. *Id.* The delivery drivers were paid $4.00 per hour plus an incentive payment for the value of the deliveries plus tips. Most of their income was derived from tips. Rec. doc. 58 at Exhibit C and Exhibit D at 14. There was no tip pool, so all tips paid to an individual driver were retained by that driver. Rec. doc. 58 at Exhibit D at 14. The drivers were issued a Form 1099 rather than a Form W2. *Id.* at 15. The kitchen and restaurant staff had federal and state income taxes withheld and Social Security taxes were paid on their wages. Rec. doc. 44 at Exhibit C.

Some of drivers worked other jobs and some did not. *Id.* at 11 and Exhibit A to Rec. doc. 60. How the schedules for the drivers was established is disputed. The affidavits of Hatipoglu and Khaleghi state that the drivers informed them of the days and times they could work and, based on that information, work schedules for the drivers were prepared and posted. Rec. doc. 57 at Exhibit A at 11. This is supported by the affidavit from Kevin Brown. Rec. doc. 58 at Exhibit C. This is contradicted by the affidavit of Mark Brown who states that the schedules were prepared by Y&H without input from the drivers. Rec. doc. 60 at Exhibit A. There is no dispute as to what occurred after a schedule was prepared. Once it was posted for the week,

the drivers were expected to work at the times shown on the schedule. *Id.* at 11 and Rec. doc. 57 at Exhibit C.

When the drivers arrived and departed they punched in or out on a time clock on the computer that was used to determine their hourly pay. *Id.* at 15. When they arrived, they prepared containers of condiments for the food they would be delivering. *Id.* at 9. One driver stated that the drivers also helped to prepare salads and deserts that were included in the home deliveries. Rec. doc. 57 at Exhibit C. At the end of a scheduled shift, they cleaned the station they used during that shift. Rec. doc. 58 at Exhibit D at 10. During the assigned shifts the drivers were assigned orders for delivery in turn. *Id.* at 12. During slow periods the drivers watched television, sat and waited, or prepared condiments for the next wave of orders. *Id.* at 12-13. The drivers never waited on customers in the restaurant or performed any other duties to assist in the operation of the restaurant. *Id.* at 13-14. Although most of the drivers had other jobs, they were only permitted to work as delivery drivers for Y&H during their scheduled shifts. *Id.* at 11 and Rec. doc. 57 at Exhibit C. Mark Brown testified that he and other drivers worked between 50 and 60 hours per week. Rec. doc. 60 at Exhibit A. Once a driver picked up an order from the kitchen for delivery it was the driver's responsibility to determine the route and manner of the delivery. Hatipoglu and Khaleghi did not supervise the drivers while they were making their deliveries. Rec. doc. 58 at Exhibit C. The drivers understood that if they did not properly perform their duties, their services would be terminated. Rec. doc. 57 at Exhibit C.

## SUMMARY JUDGMENT STANDARD

Fed. R. Civ. P. 56 provides in pertinent part that summary judgment will be granted when " . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2552 (1986). *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3189 (1990). To that end, the court must "view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Ameristar Jet Charter v. Signal Composites,* 271 F.3d 624, 626 (5th Cir. 2001). Where the record taken as whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S. Ct. 1348, 1356 (1986); *Washington v. Allstate Ins. Co.,* 901 F.2d 1281 (5th Cir. 1990).

The parties were ordered to identify any material fact concerning subject matter jurisdiction that they contend is in dispute. Rec. doc. 59. Arbaugh states that there are disputed issues of fact, but has failed to identify them. Rec. doc. 60 at p. 4. The disputed issue of fact between the parties is their conflicting accounts of how the schedules for the drivers is prepared. The undersigned will assume, for purposes of this motion, that Arbaugh's description of the preparation of the schedules is correct. In *Clark v. Tarrant County, Texas,* 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit held:

> Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint

> supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.

*Id.* at 741. Here, the issue of subject matter jurisdiction will be resolved based on the complaint and the undisputed facts.

## THE DELIVERY DRIVERS

In *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986), the plaintiff appealed from a dismissal of her Title VII action. The district court held that the plaintiff was not the defendant's employee for Title VII purposes. The Fifth Circuit held that the economic realities test guided the analysis of whether an individual was an employee for Title VII purposes, and the most important factor in determining employee status was the right to control. *Id.* at 1160. The Fifth Circuit identified facts pertinent to the issue of control. In *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D.La.) (Vance, D.J.), the *Broussard* control factors were enumerated as follows:

> The factors pertinent to this inquiry (control) are: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) forms of payment; and (8) directions on schedules and performing work.

*Id.* at *3.

The undisputed facts show that the essential equipment necessary to perform the job, a motor vehicle, was owned by each driver. Each driver was also responsible for the cost of operating the vehicle and the license fees and taxes associated with it. Each driver was responsible for obtaining insurance and for the maintenance of the vehicle. Four of the eight factors weigh against a finding of control by Y&H.

The ability to influence profits rested with the drivers. The drivers were given at least two incentives to maximize the number of deliveries they made and thereby increase their income. The first was the incentive bonus based on the dollar value of deliveries made during their shifts, and the second was their income from tips. The importance of tips is shown by the fact that the drivers retained 100% of the tips they received and were not required to pool those tips for the benefit of the kitchen staff or other persons working in the restaurant. The drivers also controlled their expenses in terms of the vehicle they chose to drive and the amount they chose to spend on operation and maintenance.

The length of the job commitment also weighs in favor of a finding that control over the drivers did not rest with Y&H. In *Cole* the plaintiff agreed to provide motor carrier transport services to the defendant. Although the plaintiff worked for the defendant for four months, either party retained the right to cancel the contract without cause on thirty days notice. The District Court found that this factor weighed in favor of a determination that the plaintiff was not under the control of the defendant. Similarly, the drivers for Y&H could be terminated at any time and the drivers could quit at anytime.

The form of payment weighs against a finding of control over the drivers by Y&H. Although Y&H withheld taxes for federal and state income taxes and paid Social Security taxes on its kitchen and restaurant staff, it did not do so for its drivers.

Although Arbaugh stresses that the work schedules posted each week demonstrate control,[3] she misunderstands the control factor. In *Cole* the District Court stated:

> Last, and most important, although Venture directed when and where plaintiff picked up and delivered cargo, plaintiff alone controlled the manner and means in which she performed her work, including the method of transport, the operation of her vehicle, the route selected, and the selection and hiring of drivers.

2000 WL 335743 at *4. As in *Cole,* Y&H directed the drivers to pick up the orders at the restaurant and deliver them to customers, but the drivers controlled the manner and means in which they operated their vehicles and selected their routes. In *Broussard* the plaintiff and her husband hired themselves and their truck out to make hauls. The plaintiff pointed to extensive direction of her work in terms of what to do and when to do it. The Fifth Circuit responded that, "[s]he misses the point: she does not really claim direction on how to operate her truck." 789 F.2d at 1160. There is no contention that Y&H told the drivers how to operate their vehicles. Y&H did not exercise

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[3] Arbaugh's reliance on Louisiana law to define the relationship between Y&H and the drivers is misplaced. The court's subject matter jurisdiction rests on Arbaugh's Title VII claim. The court must look to the law applicable to a Title VII claim to determine whether subject matter jurisdiction is present.

a right of control over the drivers sufficient to make them employees under the economic realities test. *Broussard* and *Cole* demonstrate that, even if the plaintiff's version of the setting of the schedules is accepted, Y&H did not exercise control over the drivers.

In *Broussard,* the Fifth Circuit stated that, "[t]he right to control, although the most significant factor, is not alone determinative." 789 F.2d at 1160. It identified additional relevant factors which were enumerated in *Cole* as follows:

> Additional relevant factors include: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (4) whether annual leave is afforded; (5) whether the work is an integral part of the business of the "employer;" (6) whether the worker accumulates retirement benefits; (7) whether the "employer" pays social security taxes; and (8) the parties' intention.

2000 WL 335743 at *3. It is undisputed that four of these weigh against a finding of employee status: (1) termination of work relationship; (2) annual leave; (3) retirement benefits; and (4) payment of Social Security taxes.

While the work of delivery drivers for a restaurant is not considered a specialized trade, there is no evidence that it is usually done with supervision. The *Broussard* and *Cole* cases show that delivery truck drivers for other businesses work without supervision. The delivery of food was an integral part of Y&H's business. It was sufficiently

important that Hatipoglu and Khaleghi would drive when the demand was sufficient.

Hatipoglu and Khaleghi state it was never their intention for the drivers to be employees and the drivers did not intend to be employees. Rec. doc. 58 at Exhibits A and B. This statement is self-serving. Arbaugh submitted an affidavit from Sharon Davidson, a driver, who stated: (1) she considered it her job; (2) she worked 35-40 hours per week; and (3) if she did not perform properly her employment would be terminated. Rec. doc. 57 at Exhibit C. These statements coming after the fact also tend to be self-serving. In *Cole*, the parties signed a contract that was described as an independent contractor service agreement. Y&H did not have its drivers sign such a contract. The issue of the intention of the parties must be resolved by evidence that was in place before this issue arose. Y&H reported the payments to drivers on a Form 1099. Y&H did not withhold taxes for the drivers or pay Social Security taxes for them. This is evidence that Y&H did not intend the drivers to be employees like its kitchen and restaurant staff. The fact that the drivers retained 100% of all tips received by them, provided their own vehicles and paid all expenses, demonstrates they did not intend to be employees. An employee would have expected reimbursement of his mileage expenses if he used his vehicle during the course of the company's work.

The weight of the remaining eight factors cited by *Broussard* and *Cole* is against a finding that the drivers were employees of Y&H.[4]

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[4] In contrast to *Broussard* and *Cole*, the district court in *Steehler v. Product Development Corp.*, 2001 WL 196981 (N.D. Tex.), denied a motion to dismiss and found that the facts could permit a reasonable

(Continued on following page)

person to find an employer/employee relationship for purposes of Title VII, where the plaintiff was a delivery driver for telephone books. The district court stated:

> The fact that PDC will pay for damages to vehicles that occur while making PDC deliveries, reimburse carrier expenses on long-distance deliveries, require all PDC carriers to attend training sessions and watch videos before they begin delivery, and require mandatory drug testing in the event of an accident indicates that PDC maintains more control over its carriers than it could if those carriers were strictly independent contractors. Mr. Steehler does not select his own routes, nor does he decide the manner in which the telephone books are delivered. More importantly, the application Mr. Steehler signed to work for PDC binds him to solely deliver PDC's product. Based on the aforementioned information, this Court has determined that Mr. Steehler has satisfied his burden of production on a 12(b)(6) motion that he worked for PDC as an employee, rather than an independent contractor.

*Id.* at *3. The facts described in *Steehler* are not present with the drivers for Y&H.

In *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522 (5th Cir. 2001), the plaintiff asserted state law claims of breach of contract and unjust enrichment. At issue was whether the plaintiff was an independent contractor when he drove his truck for the defendant. The Fifth Circuit considered the economic realties test for Title VII and ADEA claims and the factors considered in a FLSA claim and held that the plaintiff was not an independent contractor. The Fifth Circuit stated:

> Acme treated Hathcock as an employee for tax purposes and withheld mandated federal and state income and social security taxes from his driver's paycheck, and paid Hathcock, the driver, a regular salary as an employee. *When he drove, the terms and conditions of Hathcock's employment were set by Acme:* He had to submit to Acme's medical and driving requirements; he was subject to discipline for violation of Acme's personnel policies, including anti-harassment, drug testing, and 401(k) Plan; he was subject to discharge by Acme for violations of its Driver Manual; he was bound to work exclusively for Acme; and while doing so he had to drive a truck sporting the Acme logo at all times.

*Id.* at 526. Again, this is dissimilar to the facts before the court here.

## THE OWNER MANAGERS

For Y&H to have the requisite number, Hatipoglu and Khaleghi and their spouses must be employees. The issue is whether the corporate shareholders of a Subchapter S corporation, who also perform services for the corporation, should be considered employees of the corporation for purposes of Title VII. There is no Fifth Circuit decision that addresses this issue in the context of a Subchapter S corporation, a closely held corporation or a professional corporation. Arbaugh contends the issue should be determined by following *Trainor v. Appollo Metal Specialities, Inc.*, 318 F.3d 976, 983 (10th Cir. 2002), where the owner of a closely held corporation and a participant in a traditional employment relationship with the corporation was held to be an employee for purposes of Title VII. The defendants contend that the court should look to *Goudeau v. Dental Health Services, Inc.*, 901 F.Supp. 1139 (M.D. La. 1995) (Riedlinger, M.J.), where four dentists, who were owners of a professional corporation and who practiced dentistry through the professional corporation, were held not to be employees for purposes of Title VII.

In *Shores Realty Co., Inc. v. U.S.*, 468 F.2d 572, 573 (5th Cir. 1972), the Fifth Circuit stated:

> A corporate taxpayer found eligible for treatment as a "small business corporation" under Subchapter S of the Internal Revenue Code is relieved of the obligation of paying corporate income taxes. Instead, income received by the corporation is attributed directly to the corporation's stockholders, even if the corporation does not distribute its earnings to the stockholders in the form of money or property. Related provisions exist for the attribution of corporate losses to the stockholders.

*Id.* at 573, n. 3. In *Hollis v. Hill,* 232 F.3d 460 467 (5th Cir. 2000), the Fifth Circuit described the usual relationship between a closely held corporation and its shareholder as follows:

> Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and does not desire to assume the responsibilities of management, the shareholder in a close corporation considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership. Employment by the corporation is often the shareholder's principal or sole source of income. Providing employment may have been the principal reason why the shareholder participated in organizing the corporation. Even if shareholders in a close corporation anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive an immediate return in the form of salaries as officers or employees of the corporation, rather than in the form of dividends on their stock. Earnings of a close corporation are distributed in major part in salaries, bonuses and retirement benefits.

*Id.* at 467 (citations omitted).

In *Trainor* the only shareholders of the defendant corporation were Mr. and Mrs. Pilgrim. 318 F.3d at 978. Mr. Pilgrim was described as both an owner and a participant in a traditional employment relationship with the corporation. *Id.* at 983. The defendants argued that a partner in a partnership is not an employee for purposes of Title VII, and a shareholder owner in a closely held corporation should be treated like a partner for purposes of Title VII. The Tenth Circuit rejected this argument. It also

rejected the defendants' contention that it should follow those cases holding that shareholders in a professional corporation are not treated as employees under Title VII. *Id.* at 985-86. It recognized that, at least as to the issue of professional corporations, there was a split in the circuits. The Tenth Circuit stated:

> Courts addressing the term "employee" in the context of professional corporations have therefore either given conclusive weight to the choice of corporate form, or have disregarded that form because the entity functioned as a partnership.

*Id.* at 986. The Tenth Circuit concluded that decisions dealing with the circumstances in which a corporate officer or director is also a corporate employee offered the best guidance and stated:

> Courts have generally applied a three factor test in making this determination, looking to (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in authority.

*Id.* at 986. The Tenth Circuit found that Mr. Pilgrim met the first and second factor but not the third, and even so found an employment relationship. In *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1539, 1539 (2nd Cir. 1996), the Second Circuit found that all three factors were present. While the Second Circuit did not state that all three factors had to be satisfied, it did state that the "authoritative evaluation by their superiors suggests that J & H directors *are* employees under the common law test." *Id.* at 1540 (emphasis in original).

Assuming that the Tenth Circuit was correct in applying the three factor test to determine whether a corporate officer or director is also a corporate employee, the undersigned questions whether two of the three factors are sufficient to establish the employee relationship. Whether the director or corporate officer reports to some person or group of higher authority sensibly is an essential element of the employer/employee relationship. That being so, then in many situations involving professional corporations and closely held corporations that element will be lacking.

*Goudeau* reached a result contrary to *Trainor.* In *Goudeau,* the court applied the test used by the Fifth Circuit to determine the existence of an employment relationship; an economic realities test:

> The Fifth Circuit applies the hybrid economic realities/common law control test to determine whether an individual is an employee or independent contractor. A review of decisions applying this test, as well as the cases which address the issue when a professional corporation or partnership is involved, shows that the court cannot look merely at the label placed on an individual's status but must look to the particular facts of each case and determine the economic realities of the relationship.

*Id.* at 1143. *Goudeau* applied the economic realities test to the dentist shareholders in a professional corporation, found that the management, control and ownership were much like that of a partnership, and, for purposes of Title VII, found the dentists were not employees.

In *Fountain v. Metcalf, Zima & Co., P.A.,* 925 F.2d 1398 (11th Cir. 1991), the plaintiff contended that he was

an employee of a professional corporation engaged in the practice of accounting and that he had a cause of action under ADEA. The sole issue was whether the plaintiff was a partner in the firm or an employee. *Id.* at 1399. The Eleventh Circuit applied the economic realities test and found that the plaintiff was a partner. *Id.* at 1401.

The Fifth Circuit uses the economic realities test to resolve whether a person is an employee for purposes of Title VII. It follows that the Fifth Circuit would look to the same test to determine whether a person is a partner or an employee of a closely held corporation, a Subchapter S corporation or a professional corporation for purposes of Title VII. The economic realities test demonstrates that Hatipoglu and Khaleghi were partners. They divided the profits equally and the responsibilities of running the business were similarly divided. By virtue of Y&H's status as a Subchapter S corporation, Y&H's losses flowed back to Hatipoglu and Khaleghi. Similarly, when business was slow, for example, in July of 2000, they did not take anything out of the business. In calendar year 2000, the couples each received $60,000 from Y&H. In calendar year 2001, they each received less than $30,000. Hatipoglu and Khaleghi reported to no one other than themselves and they had control over all aspects of the business. The court, after considering the relationship, concludes that Hatipoglu and Khaleghi were not employees of Y&H for purposes of Title VII.

## THE SHAREHOLDER SPOUSES

Assuming *arguendo* that Hatipoglu and Khaleghi were employees for purposes of Title VII, their spouses must also be counted as employees to have the requisite

number of employees for subject matter jurisdiction. The spouses did no work at the restaurant. The only services they performed were occasional advertising and promotion. There is no evidence as to what the spouses actually did by way [sic] advertising and promotion. The only factor favoring a finding of an employment relationship is that Social Security taxes were paid on their income from the business.

Whether *Trainor* or *Goudeau* is followed, the result is the same. The first factor considered in *Trainor* is whether the person had undertaken traditional employee duties. The spouses did not. They did no work at the restaurant. The second factor is whether the person was regularly employed by a separate entity. At least one of the spouses was employed as a school teacher. The third factor is whether the persons reported to someone in higher authority. The arrangement for the spouses was established by Hatipoglu and Khaleghi, so it is assumed the third factor is present. The spouses did not meet the factors that *Trainor* viewed as dispositive. *Trainor,* 318 F.3d at 987. If the relationship of the spouses to Y&H is examined in light of the economic realities test, in accord with *Goudeau,* they were passive partners rather than employees. The spouses were not employees of Y&H for purposes of Title VII. Accordingly,

IT IS ORDERED that the judgment in favor of Arbaugh and against defendants (Rec. doc. 38) is VACATED and the defendants' motion to dismiss, pursuant to Fed. R. Civ. P. 12(h)(3) (Rec. doc. 44), which was converted to a motion for summary judgment, pursuant to Fed. R. Civ. P. 56 (Rec. doc. 59), is GRANTED.

IT IS FURTHER ORDERED that the following are DISMISSED as MOOT: (1) Arbaugh's motion attorney's fees (Rec. doc. 39); (2) Arbaugh's motion to amend judgment (Rec. doc. 40); and (3) defendants' renewed motion for judgment as a matter of law or in the alternative motion for a new trial and/or remittur (Rec. doc. 43).

New Orleans, Louisiana, this 2 day of April, 2003.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

MINUTE ENTRY
SHUSHAN, M.J.
DECEMBER 26, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| JENIFER ARBAUGH | CIVIL ACTION |
| VERSUS | NO: 01-3376 |
| Y&H CORPORATION, et al | SECTION: "R"(1) |

**HEARING ON MOTIONS**

(Filed Dec. 27, 2002)

APPEARANCES: Submitted on briefs

MOTIONS:

DEFENDANTS' RULE 12(h)(3) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (Rec. doc. 44)

**CONTINUED TO BE RESET AND SCHEDULING ORDER ISSUED**

ARBAUGH'S MOTION FOR ATTORNEY'S FEES (Rec. doc. 39)

**CONTINUED TO BE RESET**

ARBAUGH'S MOTION TO AMEND JUDGMENT (Rec. doc. 40)

**CONTINUED TO BE RESET**

DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AND/OR REMITTUR [sic] (Rec. doc. 43)

**CONTINUED TO BE RESET**

Before the undersigned is the motion of the defendants, Y&H Corporation ("Y&H") and Yalcin Hatipoglu, to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3). The defendants contend that Y&H does not qualify as an employer under 42 U.S.C. § 2000e(b). Y&H argues that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001.

The plaintiff, Jennifer Arbaugh ("Arbaugh"), filed this action on November 18, 2001 and asserted claims under Title VII and Louisiana law. Arbaugh alleged that during her employment at the Moonlight Cafe, as a bartender and waitress, she was discriminated against because of her sex in that she was exposed to a hostile working environment and that in February, 2001 she was forced to resign. Rec. doc. 1. Arbaugh alleged that jurisdiction was present for these claims. *Id.* The defendants admitted Arbaugh's allegations as to jurisdiction but denied her allegations on the merits. Rec. doc. 4. The parties consented to the trial of the case before a Magistrate Judge. Rec. doc. 6. A pretrial order was entered and the parties stipulated to the presence of jurisdiction. Rec. doc. 19. The action was tried before a jury on October 28 and 29, 2002 and there was a verdict for Arbaugh. Rec. docs. 33 and 36. A judgment was entered in favor of Arbaugh and against the defendants. Rec. doc. 38. Arbaugh filed a motion for attorney's fees and a motion to amend judgment. Rec. doc. 38 and 40. The defendants also filed a motion for judgment as a matter of law or in the alternative for a new trial and/or remittur [sic]. Rec. doc. 43.

Arbaugh argues that: (1) the defendants admitted jurisdiction so subject matter jurisdiction is present; (2) the defendants' evidence concerning the number of persons employed by Y&H is contradicted by the evidence at the trial; and (3) the two owners of Y&H and their wives should be included in the employee count. In response to Arbaugh's dispute with the defendants' payroll information the defendants contend that the factual issues should be resolved in an evidentiary hearing.

It is unfair and a waste of judicial resources to permit the defendants to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction were [sic] it is lacking. Pursuant to Fed. R. Civ. P. 12(h)(3) "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is hard to imagine a more explicit statement. Arbaugh cites *Di Frischia v. New York Central Railroad Co.*, 279 F.2d 141 (3rd Cir. 1969), in support of her contention that the defendants' admission of the jurisdiction allegations shows subject matter jurisdiction is present. In *Di Frischia* the parties stipulated that diversity existed. After the plaintiff's claims were time barred, the defendant challenged diversity. The court of appeals held that the defendant could not amend its answer to put diversity at issue. *Id.* at 144 The Third Circuit recognized in *Rubin v. Buckman*, 727 F.2d 71 (3rd

Cir. 1984) that *Di Frischia* was "distinguishable" because the Supreme Court[1] held that subject matter jurisdiction can never be created by estoppel. In *Rubin* the plaintiff alleged the presence of diversity of jurisdiction. Only after he lost a motion for summary judgment did the plaintiff allege that he was not a citizen of Hong Kong but a citizen of New Jersey and contend there was no subject matter jurisdiction. In *Courty v. Prot* 85 F.3d 244, 249 (5th Cir. 1996), the Fifth Circuit rejected *Di Frischia* and described it as repudiated by the Supreme Court. Even if Arbaugh had alleged that there were more than fifteen persons employed by Y&H and the defendants admitted the allegation, the law does not preclude the defendants from raising the issue at this stage.

The burden rests with Arbaugh to show that subject matter jurisdiction is present. *Boudreau v. United States,* 53 F.3d 81, 82 (5th Cir. 1995). In light of the factual issues raised by the parties concerning subject matter jurisdiction Arbaugh shall have until February 7, 2003 to conduct any discovery on these issues. During this time the defendants shall respond to all discovery requests served by Arbaugh within five (5) working days. If requested by Arbaugh, Mr. and Mrs. Hatipoglu and Mr. and Mrs. Khaleghi shall make themselves available for depositions. By February 18, 2003 Arbaugh shall file a further memorandum in opposition to the defendants' motion to dismiss, including any evidence in support of subject matter jurisdiction. By February 25, 2003 the defendants shall file a further memorandum in support of their motion to dismiss, including any further evidence on the issues. By

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[1] *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 102 S.Ct. 2099, 2104 (1982).

March 4, 2003 Arbaugh may file a final memorandum in opposition to the defendants' motion to dismiss. The defendants' motion to dismiss shall be continued and reset for hearing on Wednesday, March 5, 2003, on briefs and without oral argument.

IT IS ORDERED that:

1. The defendants' Rule 12(h)(3) motion to dismiss for lack of subject matter jurisdiction (Rec. doc. 44) is CONTINUED and RESET for hearing on Wednesday, March 5, 2003, at 9:00 a.m. on briefs and without oral argument in accord with the terms of this minute entry.

2. Arbaugh's motion for attorney's fees (Rec. doc. 39), Arbaugh's motion to amend judgment (Rec. doc. 40) and defendants' renewed motion for judgment, as a matter of law or in the alternative motion for a new trial and/or remittur [sic] (Rec. doc. 43) are CONTINUED and RESET for hearing on Wednesday, March 5, 2003, at 9:00 a.m. on briefs and without oral argument.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 03-30365

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JENIFER ARBAUGH

Plaintiff-Appellant

v.

Y & H CORPORATION, doing business as
The Moonlight Cafe; YALCIN HATIPOGLU

Defendants-Appellees

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Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Filed Oct. 13, 2004)

(Opinion 8/2/04, 5 Cir., ___, ___ F.3d ___)

Before EMILIO M. GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge